KASSIM UTUS

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH JC
[CRIMINAL APPEAL NOS: 41-21-2005 III-I,
41-18-2005-III-II, 41-17-2005-II,
41-15-2005 III-I, 41-13-2005-I & 41-14-2005-II]
19 SEPTEMBER 2005

CRIMINAL PROCEDURE: *Sentence - Appeal against - Mitigating circumstances - Factors considered - Plea of guilty - Whether brushed aside - Habitual offender - Public interest - Whether sentences ought to be reduced - Whether court could fault magistrates on their grounds for passing such sentences - Whether court ought to interfere with decision of magistrates - Whether sentences passed should run concurrently with the sessions court's imprisonment term*

CRIMINAL PROCEDURE: *Revision - Revisionary power of High Court - Whether court should intervene in Magistrate's concurrent sentence decision - Totality principle - Total of consecutive jail terms taken into consideration - Whether court declined to exercise power of revision*

The appellant herein had been charged in six cases before the magistrate's court of committing offences punishable under ss. 354, 377E, 384 and 511 of the Penal Code. There were three different magistrates who dealt with the mentioned six cases. Upon the appellant's own plea of guilty, he was convicted and sentenced by the respective courts amounting to a total of 39 years of imprisonment, including the two sessions court cases where the appellant was sentenced to seven and twelve years respectively. Six separate appeals appeared before this court and in view of the fact that they involved the same appellant with substantially similar offences, the court ordered for all the appeals to be heard together. In these appeals, the appellant submitted that his sentences in the six mentioned cases ought to be reduced and to run concurrently with the sessions court 12 year imprisonment term. The issues that arose before the court were (1) whether the sentences in the six mentioned cases were such that it required the court to interfere with the decisions of the magistrate's and (2) whether or not the sentences passed should run concurrently with the sessions court as requested by the appellant. The deputy public prosecutor (DPP) had also made a request for the court to exercise its revisionary power

to change the concurrent sentence the magistrate had ordered in regards to the fourth, fifth and sixth case which involved different transactions with different victims (concurrent sentence decision).

Held (dismissing the appellant's appeals):

[1] In the first case, the magistrate had dealt with the grounds set out in the appellant's petition of appeal and had referred to the appellant's paralyzed mother and plea that he was remorseful. These together with other factors were taken into account by the magistrate when passing her sentences. Other factors included the indecent acts the appellant had forced a 12 year old victim to perform on him which was described as inhumane, the traumatic effects on the victim, the way the victim was threatened with harm if she did not do as instructed, his past records of conviction and the public interests in this sort of offence. The aforesaid factors were relevant and as such, the sentence of five years given by the magistrate did not warrant interference from this court. (p 283 b-d)

[2] In the second case, where the maximum sentence was five years for s. 377E offences, the magistrate had sentenced him to a three-year imprisonment and a five year term for a s. 384 offence. The factors, among others, which the magistrate had taken into account was that he was a habitual offender, the age and traumatic effect on the victim, the gross indecent acts he had asked the victim to do and then robbing an innocent and defenseless child of a measly RM10 and the fact that the appellant had not learned from previous convictions. This court could not fault the magistrate on his grounds of decision as he had taken consideration of relevant factors and the sentence passed was appropriate in the circumstances. (p 283 e-f)

[3] In the third case, the same magistrate as in the second case had taken account similar factors in sentencing. Also, he had correctly refused to have the sentence passed to run concurrently with the second case as they involved different incidents. The magistrate had also brushed aside the plea of guilty by the appellant on the ground that he was a habitual offender and the circumstances of the offence. The magistrate was correct as it was not an automatic rule that an accused on a plea of guilty was entitled to a lesser sentence. (p 283 g-h)

[4] In the fourth case which concerned extortion of a young victim, the magistrate took into account the appellant's past records and came to the conclusion that the appellant was not a person who had repented. Further, prior to the commission of the act he had also forced the victim to perform indecent acts on him. The magistrate also held that there was a rampancy of this sort of offence in the State and in the interest of the public imposed a three year imprisonment term. Again, the court could not fault the magistrate on his grounds. (p 285 a-b)

[5] In the fifth and sixth case, the magistrate had taken into account the same considerations as the magistrates in the previous cases. The plea of guilty was brushed aside in view of the fact that the appellant had past records of conviction on sexual offences. The court could not fault the sentences meted out. In respect of the sixth case, the magistrate had omitted to say in his ruling whether or not the sentence in the first charge and second charge was to run concurrently or consecutively. Having listened to both sides, the court hereby ordered the sentences in the two charges to run concurrently on the ground that it involved only one transaction. (pp 285 c & f-g)

[6] The magistrate had seen it fit to order the sentences in the fourth, fifth and sixth case to run concurrently. The DPP had thus requested for this court to revise the magistrate's concurrent sentence decision. There was no dispute that the fourth, fifth and sixth case involved three different incidents and victims and the general rule as stated earlier was to impose a consecutive sentence. In the present case, if the court were to exercise power of revision, the appellant will have a sentence of 47 years as opposed to 39 years. The court, however, held that it should not intervene after taking into account the total of the consecutive jail terms that the appellant had to serve in accordance with the totality principle. The 39 years' imprisonment that the appellant would have to serve was an appropriate one. To impose another eight years would completely take away any hope that the appellant may reform while in prison and return to have some sort of normal life after serving his sentence. Accordingly, the court declined the DPP's request to exercise power of revision. (pp 287 e-f, h & 288 a-b)

[7] As to whether the court should accede to the appellant's request to have the sentences of the six cases run concurrently with the sentence passed by the sessions court, the court looked at the whole history of the appellant. In 1997, the appellant was convicted of a similar sexual offence under s. 354 of the Penal Code and was put on good behavior bond for

two years. Also he was simultaneously charged with theft by housebreaking under s. 456 of the Penal Code and was also put on good behavior bond. In 2000, he was charged with theft of a motorcycle and was sentenced to a six month imprisonment. He was charged and convicted in the sessions court for sexual offences under s. 377C of the Penal Code in which he was sentenced to seven and 12 years respectively. Then for these six cases under appeal he was convicted and sentenced in April 2005. The acts involved were indecent which prompted one magistrate to equate his acts to that of a monster and another to describe him as inhumane. The crimes committed by the appellant involved sexual molestations of girls who were young and vulnerable. The gravity of his offences was of a very high order and the circumstances were deplorable. They were demeaning and degrading of the children involved and likely to have an adverse effect on them. Their rights and interests must be taken into account. Public interest demands that people who commit sexual offences on the young and innocent must be dealt with severely and sentences meted out must reflect the society's disdain for such crimes. In any event, the appellant had not shown any good reasons why the court should accede to his request. (pp 286 e-h & 287 a, c-d)

[Confirming the sentences imposed by the magistrates and altering the magistrate's decision in the sixth case on terms set out above.]

Case(s) referred to:
Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA ***(refd)***
Jaafar Abu & Anor v. PP [1988] 2 CLJ 595; [1988] 1 CLJ (Rep) 142 SC ***(refd)***
Mohamed Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
New Tuck Shen v. PP [1982] 1 MLJ 27 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Yap Huat Seng [1985] 2 MLJ 414 ***(refd)***
Vaitos v. R [1981] 4 A Crim R 238 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 323
Penal Code, ss. 354, 377C, 377E, 384, 456, 511

Other source(s) referred to:
Principles of Sentencing, 2nd edn, pp 57-58

Appellant in person
For the respondent - Young Leou Shin DPP

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah JC:

On 8 September 2005 when I sat I had six separate appeals before me and in view of the fact that they involved the same appellant with substantially similar offences and for convenience, I ordered that all the appeals be heard together.

The charges against the appellant were as follows:

(i) First Case: M-83-482-2004-B

That you, on 14 July 2003 at about 3pm in the bush at Jalan Batu Kitang, Kuching, in the State of Sarawak, did use criminal force to one Mastuyah binti Ahmad (f) with intent to outrage her modesty and you thereby committed an offence punishable under s. 354 of the Penal code. (Maximum term of imprisonment of 10 years)

(ii) **Second Case: M-83-484-2004-D/E**

Main Charge:

That you on 15 May 2003, at about 12.30pm in the bush at Lorong 11 Jalan Semaba, Kampung Haji Baki, in the District of Kuching, in the State of Sarawak incited one Marlina bte Mahamatnor (f) age eight years three months to an act of gross indeceny with you and thereby committed an offence under s. 377E of the Penal Code. (Maximum term of imprisonment of five years)

2nd Charge:

That you on 15 May 2003, at about 12.30pm in the bush at Lorong 11 Jalan Semaba, Kampung Haji Baki, in the District of Kuching, in the State of Sarawak committed extortion by intentionally putting Marlina bte Mahamatnor (f) in fear of personal injury and you thereby dishonestly induced the said Marlina bte Mahamatnor (f) to deliver you a certain property, to wit RM10, and you have thereby committed an offence punishable under s. 384 of the Penal Code. (Maximum term of imprisonment of 10 years)

(iii) Third case: M-83-481-2004-E

That you, on 2 July 2002 at about 5pm in the bush at Kpg Hj Baki, Jalan Batu Kiting, Kuching, in the State of Sarawak, did use criminal force to one Nur Farashida binti Ismail (f) with intent to outrage her modesty and you thereby committed an offence punishable under s. 354 of the Penal Code. (Maximum term of imprisonment of 10 years)

(iv) Fourth Case: M-83-479-2004-C

That you on 6 December 2003, at about 3pm to 5pm in the bush at Jalan Batu Kitang, Kuching, in the State of Sarawak, committed extortion to one Nursyahirah bte Shamsul (f) by putting her in fear of personal injury and you have thereby induced the said Nursyahirah bte Shamsul (f) to deliver to you a certain property, to wit a bangle, and you thereby committed an offence punishable under s. 384 of the Penal Code. (Maximum term of imprisonment of 10 years)

(v) Fifth Case: M-83-480-2004-D/C

That you on 19 June 2002 at about 7am inside a bush nearby Kuching High Secondary, Kuching in the State of Sarawak used criminal force in Hafizah binti Abduk Hafis (f), 10 years old knowing it to be likely that you would thereby outrage her modesty, and you thereby committed an offence under s. 354 of the Penal Code (Maximum term of imprisonment of 10 years)

(vi) Sixth Case: M-83-483-2004-C

1st Charge:

That you, on 24 July 2004, between the hours of 2pm and 4pm in the bush at a spot along Jalan Batu Kitang, Kuching, in the State of Sarawak, used criminal force on Nur Amalina bte Salleh (f), knowing it to be likely that you would thereby outrage her modesty, and you thereby committed an offence punishable under 354 of the Penal Code. (Maximum term of imprisonment of 10 years)

2nd Charge:

That you on 24 July 2004, between the hours of 2pm and 4pm in the bush at a spot along Jalan Batu Kitang, Kuching, in the State of Sarawak, incited Nur Amalina bte Salleh (f), birth certificate No. A 09959/93 to wit, a child under the age of 14 years and had carnal intercourse against the order of nature with the introduction of your penis into the month of one Nur Amalina bte Salleh (f), birth certificate No A 09959/93, 11 years and 11 months, and you thereby committed an offence punishable under s. 377E of the Penal Code. (Maximum term of imprisonment of five years)

The brief facts as admitted by the appellant in respect of each case are as follows:

(i) First Case: M-83-482-2004-B

On 14 July 2003 at about 3pm at the bushes in the area of Jalan Batu Kitang, Kuching, the appellant threatened a 12 year old female and forced her to undress where he molested the victim by fondling her private parts and forced her to perform an indecent act on him to satisfy his sexual desire. The appellant also threatened to hit her with the helmet if she tried to escape.

(ii) Second Case: M-83-484-2004-D/E

On 15 May 2003 on 12.30pm, the appellant after taking a female victim, aged six years nine months away to Lorong 11, Jalan Semeba, Kuching threatened her that he will not send her back home if she did not do as instructed and then forced her to hold and play with his private part. After the incident he took RM10 belonging to the victim.

(iii) Third Case: M-83-481-2004-E

On 2 July 2002 at about 1730 hrs, complainant ie, Patimah bte Bujang (F), K/P 620205-13-5644 of No. 47 Blok B, Kpg. Hj. Baki Kuching was told by her daughter aged 10 years old (victim) that she had been asked by an unidentified man (appellant) to show the way to victim's school at SK. Hj. Baki, Kuching.

The appellant then took her to nearby bushes and forcibly took off the victim's panties and touched her private parts. She shouted for help but the appellant slapped her face twice and threatened to kill her. The victim managed to escape and get help from a kampong man who sent her home.

(iv) Fourth Case: M-83-479-2004-C

On 6 December 2003 at about 3pm, a female victim aged 11 years old was abducted by the appellant on a motorcycle and taken to bushes at Jalan Batu Kitang where he forced her to perform indecent acts on his private part and thereafter took the victim's gold chain and gold bracelet. After that the victim was taken to Kpg. Ajibah Abol's area and forced to walk home.

(v) Fifth Case: M-83-480-2004-D/C

On 19 June 2002 at about 8.30am at bushes not far away from Sekolah SMK Kuching High's area, Kuching, the appellant forced a female victim aged 10 years old to take off her panties where he performed indecent acts on the victim's private part. After that, the victim cried and ran away from that place.

(vi) Sixth Case: M-83-483-2004-C

On 24 July 2004 at about 1.40pm, a female victim aged 11 years old was abducted by the appellant using a motorcycle from her grandmother's house at Kampung Lintang. The appellant, pretending to ask the victim to hop on his motorcycle to show him the way to Pangkalan Kpg. Lintang, instead took her to bushes near Jalan Batu Kitang where he forced the victim to perform indecent acts on his private part twice. The appellant also threatened the victim that if she did not do as instructed she will not be sent home. The appellant also asked her to take off her underwear and sit on his motorcycle with open legs where the appellant performed indecent acts on her private part. After that, the appellant abandoned her at the side of the road for her to find her way home.

Upon the appellant's own plea of guilty, he was convicted and sentenced by the respective courts as follows:

(i) First Case

Five years imprisonment to commence after the appellant's sentence in SC-62-262-2004-I which expires on 13 August 2016 (assuming remission is granted) and 2 strokes of rotan.

(ii) Second Case

Main Charge – Three years imprisonment to commence after the appellant's sentence in M-83-482-2004-B (first case) and 4 strokes of the rotan.

Second Charge – Five years imprisonment to run concurrently with the sentence under the main charge and 1 stroke of the rotan.

(iii) Third Case

Five years imprisonment to commence after the appellant's sentence in M-83-484-2004-D/E (second case) and 1 stroke of the rotan.

(iv) Fourth Case

Three years imprisonment to commence after the appellant's sentence in M-83-481-2004-E (third case) and to run concurrently with M83-480-2004-D/C (fifth case) and M-83-483-2004-C (sixth case).

(v) Fifth Case
Five years imprisonment to commence after the appellant's sentence in the third case and to run concurrently with the fourth and sixth case and three stokes of the rotan.

(vi) Sixth Case

1st charge – Five years imprisonment and 1 stroke of rotan. 2nd charge – Three years imprisonment and 1 stroke of rotan.

Sentence to commence after the appellant's sentence in the third case and to run concurrently with sentences in fourth and fifth case but with no direction as to whether or not the sentences under both charges are to run concurrently or consecutively.

So in total the appellant has been sentenced to 39 years including the two Sessions Court cases where the appellant was sentenced to 7 and 12 years respectively. With the one third remission, he will be serving 26 years. Thus far he had served about a year and nine months. The rotan sentences had been executed hence these appeals shall only be concerned with the imprisonment terms.

In an appeal against sentence, it is trite law that the Appellate Court will only interfere if it is shown that the lower court had acted on wrong principles in coming to its decision ie, by taking into consideration irrelevant matters or the sentence is manifestly excessive or illegal. Further it is an established practice that the Appellate Court will not alter a sentence merely because it might pass a different sentence. See *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256; *New Tuck Shen v. Public Prosecutor* [1982] 1 MLJ 27).

In dealing with these appeals, I am of course bound by the principles expounded by Mohamed Azmi SCJ in the case of *Mohamed Abdullah Ang Swee Kang v. Public Prosecutor* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 and I quote:

> In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and, fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as deterrence does not justify the sentencer in passing a sentence of greater length than what the facts of the offence warrant ...

A sentencer must give sufficient discount for all extenuating circumstances pertaining to the degree of culpability or criminality involved, which must necessarily vary from case to case apart from other mitigating factors. Unless there is a proper reason for withholding such credits, failure to do so may result in the sentencer not exercising his or her discretion judicially in assessing the level of custodial sentence.

Guided by the above principles, I now consider the issues which confront me and they are as follows:

1. Whether the sentences in the above six cases are such that it requires me to interfere with the decisions of the Magistrates?;

and

2. Whether or not the sentences passed should run concurrently with the Sessions Court case SC-62-260-2004-II (commencing from 13 August 2008) as requested by the appellant?

Before I proceed further, it should be made known that the appellant had on 3 March 2005 been convicted in the Sessions Courts and sentenced for seven years and 12 years in case SC-62-262-2004-I and SC-62-260-2004-II respectively which sentences are to run consecutively. The appellant had appealed against the aforesaid sentences to the High Court which on 26 May 2005 dismissed the appeals. The charges therein were s. 377C read together with s. 511 of the Penal Code which offences are sexual in nature.

In these appeals the appellant submits that his sentences in the six cases before me ought to be reduced and also to run concurrently with the Sessions Court 12 year imprisonment term which commences on 13 August 2008. His grounds as set out in his petition of appeal filed with the court are:

1. He comes from a poor family because at the moment his mother is old and she is paralyzed and is not capable of working.

2. His wife is unemployed because she has asthma and now she has to work as a cleaner at a coffee shop with an income of RM250 per month to support his family and pay for the school fees of her nine year old daughter.

3. He is ashamed and really regrets his actions. He is remorseful of his actions and promised to myself and the court not to repeat the offences again.

4. In view of the above he urges the court to give a lenient sentence.

Before I deal with the grounds of the decisions of the Magistrates, it should be noted that there were three different magistrates who dealt with the six cases. The first case was dealt with by one magistrate while the second and third cases were dealt with by another magistrate with the fourth to the sixth cases being dealt with by a different magistrate. Except for the first case which was heard on 7 April 2005, the other cases were heard on the same day on 18 April 2005.

In the first case, the learned Magistrate in fact had dealt with the grounds set out in the appellant's petition of appeal. At p. 10 of the record of appeal the learned Magistrate refers to the appellant's paralyzed mother and plea that he was remorseful. These together with other factors were taken into account by the learned Magistrate when passing her sentences. Other factors included the indecent acts forced to be performed on the appellant by a 12 year old victim which she described as inhumane, the traumatic effects on the victim, the way the victim was threatened with harm if she did not do as instructed, his past records of conviction and the public interests in this sort of offence. The aforesaid factors in my view are relevant ones and as such I cannot fault the learned Magistrate and hold that the sentence she gave was one which does not warrant interference from me.

In the second case, where the maximum sentence is five years for s. 377E offences, the learned Magistrate sentenced him to a three year imprisonment term and a five year term for the s. 384 offence. The factors, among others, which the learned Magistrate took into account are that he is a habitual offender, the age and traumatic effect on the victim, the gross indecent acts he asked the victim to do and then robbing an innocent and defenseless child (which the learned Magistrate described as an act of a monster) of a measly RM10 and the fact that the appellant appears to have not learned from previous convictions. Again I cannot fault the learned Magistrate in his grounds of decision as he took into consideration relevant factors and as such I hold that the sentence passed is appropriate in the circumstances.

In the third case, the same Magistrate as in the second case took in the account similar factors in sentencing. Also in his grounds he correctly refused to have the sentence passed to run concurrently with the second case as they involved different incidents. The learned Magistrate also brushed aside the plea of guilty by the appellant on the ground that the appellant is a habitual offender and the circumstances of the offence. Again the learned Magistrate is correct as it is not an automatic rule that an accused on a plea of guilty is entitled to a lesser sentence. I refer to the case of *Bachik Abdul Rahman v. PP* [2004] 2 CLJ 572, where the Court of Appeal had this to say:

The learned judge appears to have taken the view that credit should be given in every case where a person pleads guilty. The position in law is that it is generally accepted that an accused person should be given credit or discount for pleading guilty (see *Sau Soo Kim v. PP* [1975] 2 MLJ 134; *PP v. Sulaiman bin Ahmad* [1993] 1 MLJ 74; *PP v. Ravindran & Ors* [1993] 1 MLJ 45). The discount that is given is normally a reduction of the sentence by about a third of what would otherwise have been imposed (see *Mohamad Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209; *PP v. Muhari bin Mohd Jani & Anor* [1999] 8 CLJ 430; *Christopher Khoo Ewe Cheng v. PP* [1998] 3 CLJ 705). However, this is not a strict rule as the court may, in the exercise of its discretion, refuse to grant any discount in an appropriate case (see *Zaidon Shariff v. PP* [1996] 4 CLJ 441; *Lee Say & Ors v. PP* [1985] 2 CLJ 155; [1985] CLJ (Rep) 683). Its application in favour of an accused depends on the facts and circumstances of each case (see *Wong Kai Chuen Philip v. PP* [1991] 1 MLJ 321). Thus, as lucidly explained by Charles JA in *Leigh Nicholas Donnelly v. R* [1997] 91 A Crim R 550 at p. 554:

> A court's attitude towards the fact of a plea of guilty is expected to act as an encouragement to enter such a plea. The issue with which the court is to be concerned is what weight should be given to it in the circumstances.

The circumstances in which a guilty plea will not have any weight are varied. The severity of the offence committed may outweigh the mitigating effect of a guilty plea (see *Loh Hock Seng & Anor v. PP* [1980] 2 MLJ 13; *PP v. Oo Leng Swee & Ors* [1981] 1 MLJ 247). Where public interest demands a deterrent sentence in the circumstances of a particular case, then the effect of a guilty plea must also give way (see *Sim Gek Yong v. PP* [1995] 1 SLR 537; *PP v. Govindnan a/l Chinden Nair* [1998] 2 CLJ 370). A guilty plea cannot also be a powerful mitigating factor when effectively no defence to the charge is available to the accused (see *PP v. Low Kok Wai* [1988] 2 CLJ 105; [1988] 2 CLJ (Rep) 268). If a plea of guilty is made too late in the trial it may also cease to have mitigating effect (see *PP v. Dato' Nallakaruppan Solaimalai* [1999] 2 CLJ 596). The absence of mitigating factors in favour of the accused like, for instance, the existence of previous convictions may also deprive the guilty plea of its effect. There can therefore be no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment (see *PP v. Tia Ah Leng* [2000] 5 CLJ 614). Be that as it may, where there is a departure from the general rule the reason for not treating the guilty plea as a mitigating factor must be reflected in the grounds of judgment (see *Tan Lay Chen v. PP* [2000] 4 CLJ 492).

As the fourth to the sixth case were dealt with by the same Magistrate who ordered the sentence in the fourth case to run concurrently with fifth and sixth case, I shall deal with them together.

In the fourth case which concerns extortion of a young victim, the learned Magistrate took into account of the appellant's past records and came to the conclusion that the appellant is not a person who had repented. Further prior to the commission of the act he also forced the victim to perform indecent acts on him. The learned Magistrate also held that there is a rampancy of this sort of offence in the State and in the public interests imposed a three year imprisonment term. Again I cannot fault the learned Magistrate on his grounds.

In the fifth and sixth case, the learned Magistrate took into account the same considerations as the Magistrates in the previous cases. The plea of guilty was brushed aside in view of the fact that the appellant had past records of conviction on sexual offences. And in my view a correct approach on grounds as stated by me earlier. Also I cannot fault the sentences being meted out.

However the learned Magistrate saw fit to order the sentences in fourth, fifth and sixth case to run concurrently despite the fact that the fourth, fifth and sixth case involved different transactions with different victims (concurrent sentence decision). When we sat on 15 September 2005, another DPP appeared for the prosecution and urged me to exercise my revisionary power under s. 323 of the CPC to change the concurrent sentence decision of the learned Magistrate. No submission on this point was made by the other DPP when we sat on 8 September 2005 as there were no cross appeal. Be that as it may, as the learned DPP has now made a request to me to exercise my revisionary power, I shall deal with it but in the later part of my judgment when I consider the second issue.

In respect of the sixth case, the learned Magistrate omitted to say in his ruling whether or not the sentence in the 1st charge and 2nd charge is to run concurrently or consecutively. I pointed this out to the DPP and the appellant during the hearing dated 15 September 2005. The appellant naturally urged this court to have the sentences run concurrently. As for the DPP, she submitted that in view of the fact the offences arose from one transaction the sentences should run concurrently. Having listened to both sides I hereby alter the learned Magistrate's ruling in case M-83-483-2004-C by ordering the sentences in the two charges to run concurrently on the ground that it involved only one transaction based on the principle stated by Shaikh Daud J in *PP v. Yap Huat Seng* [1985] 2 MLJ 414.

I come now to the second issue of whether or not I should accede the request of the appellant to have the sentences of the six cases to run concurrently with the sentence passed by the Sessions Court in case SC-62-260-2004-II which takes effect from 13 August 2008.

The DPP in opposing the appellant's request for concurrent sentences submitted that the appellant deserves no mercy from this court as he is habitual sexual offender, his claim of remorse is not genuine, and in view of the rampancy of this sort of offence in the State, public interest demands that the sentences handed down by the Magistrates should not be disturbed. Further if the sentences are to run concurrently as suggested by the appellant, it would mean that he would escape total punishment for the crimes he had committed.

The issue which confronts me is that because of the consecutive nature of the sentences handed down whether or not the total of 39 years of imprisonment term would have such crushing effect on the appellant such that this court should interfere with the sentences handed down. This concerns the totality principle which is explained by the learned author in *Principles of Sentencing*, 2nd edn at pp. 57-58 (referred to in *Bachik Abdul Rahman v. PP* [2004] 2 CLJ 572) where he states as follows:

> The many decisions of the court in which the totality principle has been applied to explain the reduction of a cumulative sentence made up of correctly calculated individual parts suggest that the principle has two limbs. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved, or if its effect is to impose on the offender 'a crushing sentence' not in keeping with his record and prospects.

To determine this issue, I look at the whole history of the appellant. In 1997, he was convicted of a similar sexual offence under s. 354 of the Penal Code and was put on a good behavior bond for two years. Also he was simultaneously charged with theft by housebreaking under s. 456 of the Penal Code and was also put on good behavior bond. In 2000, he was charged with theft of a motor cycle and was sentenced to a six month imprisonment. Then of late on 3 March 2005, he was charged and convicted in the Sessions Court for sexual offences under s. 377C of the Penal Code in which he was sentenced to 7 and 12 years respectively. Then for these six cases under appeal he was convicted and sentenced in April 2005. The acts involved were indecent to say the least which prompted one Magistrate to equate his acts to that of a monster and another to describe them as inhumane. Though these comments may be strong, in my view they are not far off the mark considering the tender age of the victims. The society especially the young ones need to be protected from people like the appellant who in fact had not repented from his crimes. The crimes committed by the appellant involved sexual molestation of girls who were young and vulnerable. One of the victims was ONLY six years and nine months old. The gravity of his offences was of a very high order. The circumstances of the offences were deplorable. They were demeaning and degrading of the children involved and likely to have an adverse

effect on them for the rest of their lives and also on their parents. Their rights and interests must be taken into account. As O'Bryan J said in *Vaitos v. R* [1981] 4 A Crim R 238 at p. 301:

> I have some difficulty appreciating the concept that a richly deserved sentence, not manifestly excessive, should be disturbed because the person upon whom the sentence is imposed may feel crushed by it. It is quite true that the applicant has to face a very long term of imprisonment before he will be released and because he is a comparatively young man, many of the best years of his life will be spent in custody. However, from the community point of view, his detention for a very substantial period is necessary to protect females from his criminal behaviour.

It cannot be denied that the appellant may be crushed by the lengthy sentences but this effect must be balanced against what I have elaborated earlier. Public interest demands that people who commit sexual offences on the young and innocent must be dealt with severely and sentences meted out must reflect the society's disdain for such crimes.

In any event the appellant had not shown me any good reasons why I should accede to his request and deviate from the general rule as stated by Shaikh Daud J in *PP v. Yap Huat Seng* [1985] 2 MLJ 414.

I deal now with the request of the learned DPP to revise the learned Magistrate's concurrent sentence decision. My power of revision remains intact even in appeal proceedings, (see *Jaafar Abu & Anor v. PP* [1988] 1 CLJ [1988] 2 CLJ 595; [1988] 2 CLJ (Rep) 142). The learned DPP submits that the learned Magistrate was wrong in coming to a concurrent sentence decision and refers to the case of *PP v. Yap Huat Seng* [1985] 2 MLJ 414. There is no dispute that the fourth, fifth and sixth case involved three different incidents and victims and the general rule as stated earlier is to impose a consecutive sentence. However this court still has the discretion to decide whether or not in the circumstances a concurrent or consecutive sentence should be imposed. This discretion stems from the totality principle which the Court of Appeal in *Bachik Abdul Rahman v. PP* accepted it as part of the consideration in determining the length and nature of sentence to be imposed. Reverting to the present case, the appellant will, if I do exercise my power of revision, have a sentence of 47 years as opposed to 39 years if I do not exercise my power of revision. This matter could have been appealed by the prosecution but did not do so and in such a situation unless good reasons are given for failure to appeal the use of the power of revision will not be appropriate. No reason was given. Be that as it may this court can still act if it is in the interests of justice. However I do not think I should intervene after taking into account that the total of the consecutive jail terms that the appellant has to serve in

accordance with the totality principle. The 39 years' imprisonment that the appellant would have to serve in my view is an appropriate one. To impose another eight years would completely take away any hope that the appellant may reform while in prison and return to have some sort of normal life after serving his sentence. With a one third remission, he would be out when he is 56 and this court would like to think that the appellant while in prison can still find some goodness in his heart so that when he returns to the society he would be a reformed person. Accordingly, I decline the learned DPP's request to exercise my power of revision.

For reasons given above, I dismiss the appeals by the appellant and confirm the sentences imposed by the learned Magistrates and alter the learned Magistrate's decision in the sixth case on terms set out above.